APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. H78-0065 (C)

ROSE HARRELL, ET AL PLAINTIFFS

V.

NORTHERN ELECTRIC COMPANY, DEFENDANT
DIVISION OF SUNBEAM CORPORATION

JUDGMENT

This is a Title VII suit. The plaintiff instituted this suit on authority of a ninety day letter from EEOC indicating the existence of probable cause. The plaintiff is a female black whose ambition exceeds her grasp. She was in the employ of the defendant in the production department, but desired a promotion to the clerical department, and quit when it was not granted. This is this law suit in a nut shell.

Plaintiffs' Exhibit 25 will be entered into evidence and so marked by the Court.

Plaintiffs' motion to exclude the evidence and enter a judgment for the plaintiffs is overruled. Plaintiffs' motion for allowance of a reasonable attorney's fee is denied. Defendant's motion for an allowance of a reasonable attorney's fee is likewise denied.

This Court has full jurisdiction of the parties and the subject matter under Title VII of the United States Code. Plaintiffs have exhausted all of their administrative remedies and have timely filed this suit in this Court as authorized by EEOC letter of authorization.

Plaintiff (Rose Harrell) is a black female who contends here that she has been discriminated against by the defendant on her applications for a clerical job. Plaintiff brought this suit on her own behalf and on behalf of all other blacks who have been discriminated against because of their race by the defendant at its Hattiesburg, Mississippi facility. This litigation has been vigorously prosecuted and vigorously defended at all stages of this case by able counsel on both sides. Actually, the only single question before this Court is to determine on a fair trial whether or not Rose Harrell and her class, as fixed by this Court, have been unlawfully and improperly discriminated against solely because of their race at the Hattiesburg, Mississippi facility. No occasion exists for any inflammatory action by counsel on either side in this very simplified controversy.

Plaintiff was employed by the defendant in a production position but she desired employment in a clerical position and quit her job. Plaintiff repeatedly sought a clerical position with the defendant but was in each instance properly denied such transfer. The plaintiff had a poor work record with the defendant and never had any experience or work experience in a clerical position. Plaintiff never

showed this Court by the greater weight of the more convincing evidence that defendant had any clerical position open and available to anyone holding the qualification and experience of the plaintiff. Plaintiff's proof in this case that defendant nevertheless continued to employ people, and more particularly white people for clerical positions at the time she sought and was denied employment, simply fails to show this Court that plaintiff was not hired just because she was black. Plaintiff has not shown this Court by the requisite evidence as to the experience and qualifications of those persons hired by the defendant in the clerical department. There is no testimony anywhere to be found in this record that this defendant continued to accept applications from and to employ persons in its clerical department who held merely the qualifications and experience and work record of plaintiff.[1]

The plaintiff has simply failed to show this Court by a preponderance of the evidence that she has been discriminated against by the defendant at the Hattiesburg facility solely and alone because she is black and for no other reason. That duty and that obligation was imposed by law upon the plaintiff to afford her the rights of a liti-

---

[1] *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792, 93 S.Ct. 1817, 1824 the Court held: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

gant who has established such wrong in a prima facie case to the necessary extent to entitle the plaintiff to make out a prima facie case and obligate the defendant to show otherwise. The plaintiff simply has not made out such a prima facie case in this Court; and this Court finds as a fact and adjudges as a matter of law that the plaintiff has not been discriminated against by the defendant solely because she is black.

This Court heard six witnesses for the plaintiff and members of her class, and six witnesses for the defendant, including an expert witness on each side of the case. The defendant in this case was a new industry in the area which was brought in to aid and assist the economy under the state policy of balancing agriculture with industry. It was important to this new industry that it employ competent and qualified people in its specialized field. Actually, it sought the aid and assistance of the Mississippi State Employment Commission to send it competent and qualified people whom the defendant carefully screened and employed when it determined by proper investigation that such persons were competent and qualified to hold jobs with the defendant. Race did not and never has been any one of this criteria for holding a job; and this agency which produces and sells to the general public an article which is useful and helpful to any person in the home regardless of his race and certainly has no predisposition to any improper use of race in its hiring processes. Plaintiff's race certainly had nothing to do with the denial of her application to the job of PBX operator. Plaintiff did not

even attempt to show that a white person hired for the position had any qualification near those possessed by the plaintiff. Likewise, Susan Bell Williams was not a similarly situated white who was treated better than Rose Harrell since Susan Bell Williams' work record was not marred by disciplinary warnings, poor production, absenteeism, tardiness, etc., and since Susan Bell Williams, unlike plaintiff, had the ability to operate a calculator, a skill relevant to the work of a traffic clerk. Plaintiff claimed that she was discriminatorily denied transfer into two other clerical positions, but plaintiff was unable to state what those positions were, who received the positions, or what experience, knowledge or skill the two alleged white individuals who received these alleged clerical openings possessed. Defendant demonstrated that white employees, Joan Graves and Vickie Graham, both of whom sought transfers from a production position to a clerical position, and both of whom has similar experience, skills and ability to the plaintiffs, were denied transfers. Plaintiff has thus failed to show by a preponderance of the evidence that defendant's reason for not placing her in a clerical position, either initially or by a subsequent transfer, was a pretext to cover up racial discrimination. Plaintiff next undertook to prove a prima facie case of class discrimination by the use of statistics. The defendant presented testimony of a learned and experienced statistician (Dr. Arnold Levine) who is the head of this department at Tulane University.[2]

[2] At the outset, it must be understood that a trier of facts need not accept the opinion testimony of expert witnesses, even though uncontradicted. *Boon Enterprises, Inc. v. Carstairs*, (5CA) 312 F.2d 333; *Alfred Griffin v. Missouri Pacific Railroad Company*, (5CA) 413 F.2d 9, 13.

Plaintiff's Exhibit 24 is incomplete and misleading and does not constitute any valid statistical evidence of significant disparity. The testimony of Rose Harrell, Betty Dagons and Patricia Pittman failed to show that there were clerical openings at the time they applied for work with the defendant. The evidence in any event did not show that there were any clerical openings at the time plaintiff and Dagons applied, and neither were qualified to fill the openings since they did not possess the requisite experience to fill those initial openings. There was no evidence of any discrimination in defendant's transfer policies (excluding for analytical purposes, the work record at defendant's plant of Harrell, Dagons and Pittman) that similarly situated or lessor qualified white received clerical positions ahead of Harrell, Dagons and Pittman. Neither plaintiff nor Dagons nor Pittman were qualified to transfer from a production position to a clerical position since their work records at defendant's plant was poor. Dr. Levine credibly showed that plaintiff's expert (Dr. Graber) impermissibly mixed different population pools in lumping into the number of applicants the transfers from Laurel and Waynesboro to Hattiesburg, and in lumping into the number of hires these transfers and the transfers from production positions into clerical positions. Dr. Levine contended that it was impermissible to mix transfers from production to clerical with applicants who had never worked for the defendant since different criteria governed their selection. That is, although one's ability, skills, education and experience were relevant, the work record at defendant's plant of the employees seeking transfer from pro-

duction to clerical dispositively could result in the rejection of a transfer being sought, whereas applicants who had never worked for defendant were chosen or rejected for clerical openings based only upon abilities, skills, education and experience acquired elsewhere.

Dr. Levine testified and his exhibits showed that there was no statistical evidence of disparity in defendant's hiring policies. Defendant's Exhibit 13, which analyzes and stipulates the number of applicants and correct number of hires was totaled in black, indicates no statistical disparity exists. Dr. Levine's conclusion that twelve blacks were either hired for clerical positions, or offered clerical positions, was supported by credible and convincing evidence. Both plaintiff and defendant stated that eight blacks were actually hired into clerical positions. The record irrefragably shows that it was defendant's regular business practice to record evidence of job offers on individual's application form. Defendant presented the application form of four blacks and nine whites, whereupon it was shown that clerical offers had been made. Plaintiff's attempt to discredit the fact that job offers had been made clearly failed. Janice Wilson (Richards) and Carolyn Reed were interested witnesses, that is, they were offered jobs. They thereby eliminated themselves from any potential recovery available to class members should this Court find defendant guilty of discrimination. Wilson admitted that the indication that she had accepted other employment on her application form was correct, if the notation was made after she had been referred by Jobs Unlimited, her employ-

ment agent, for work at Rhodes Furniture.

This Court has heard testimony in this case extensively from twelve witnesses and finds as a fact and adjudicates as a matter of law that plaintiff and her class of witnesses in this case have failed to show the Court by a preponderance of the evidence that plaintiff and members of her class as black citizens have been discriminated against by the defendant because of their race at the Hattiesburg facility; and that the plaintiff has thus failed to show this Court by a preponderance of the evidence that they have thus established a prima facie case on this record to show any illegal racial discrimination in their hiring processes down here at Hattiesburg.[3]

Accordingly, the motion of the defendant to dismiss plaintiff's individual action and her class action for failure to establish a prima facie case of discrimination will be and is sustained.

The defendant is invited by the Court to present, if desired, a clear and concise statement of facts to accompany this judgment and be made a part hereof by adoption if and when executed by the Court. Plaintiff and members of the class are assessed with all costs of this suit to be taxed by the Clerk of this Court and for all of which proper process may issue.

---

[3] "Tis not the many oaths that make the truth,

But the plain single vow that is vow'd true."

ORDERED AND ADJUDGED, this August 25, A.D., 1980.

/S/ HAROLD COX
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

ROSE HARRELL,

Plaintiff,

versus

CIVIL ACTION

NORTHERN ELECTRIC COMPANY A DIVISION OF SUNBEAM CORPORATION,

NO. H-78-0065 (C)

Defendant.

STATEMENT OF FACTS

The Court herewith adopts the following Statement of Facts in conjunction with the Judgment rendered on August 25, 1980.

1.

Plaintiff Rose Harrell contended that she was discriminatorily denied a clerical position at Defendant Northern Electric Company's Hattiesburg facility because of her race. She similarly claimed that Defendant discriminated against the class certified in this matter by denying them clerical positions at the Defendant's facility because of their race. The facts do not support Plaintiff's contentions either as to her individual claim or as to her claims on behalf of the class.

2.

Plaintiff contended that she was discriminated

against in not being hired into a clerical position when she initially applied for work at the Defendant's facility. The undisputed facts reflect that in filling the initial clerical positions at its facility, Defendant sought and filled such positions with individuals who had prior clerical experience. Plaintiff had no prior clerical experience. She was not discriminated against with respect to initial hire.

3.

Plaintiff contended that she was discriminatorily denied a transfer to a clerical position after she was hired as a production worker. This contention was refuted by Plaintiff herself on cross-examination wherein she testified that the only discrimination of which she was complaining occurred in September, 1974, around the time of her initial hire. Nonetheless, the facts do not support a finding that Plaintiff was discriminatorily denied a transfer to a clerical position inasmuch as Plaintiff was not qualified for such a transfer given her poor work record. The undisputed facts established that a poor work record essentially disqualified a person from transferring to a position of greater authority which is what a clerical position would represent.

4.

There was no evidence to reflect that there was any intentional discrimination directed against Plaintiff by Defendant.

5.

Plaintiff did not establish that she was treated any differently than would a similarly situated white person have been treated. To the contrary, the undisputed facts disclose that at least two white production employees were denied transfers to clerical positions in the same way as was Plaintiff.

6.

Plaintiff did not present any credible statistical analyses in attempting to prove discrimination on behalf of the class. To the contrary, the statistical analyses presented by Plaintiff's expert witness, Dr. Robert Graber, were misleading, illogical, and based upon incorrect information. Dr. Graber's analysis, as reflected in Plaintiff's Exhibit 23, incorrectly includes transfers from other Company facilities and transfers from production to clerical positions. The analysis further fails to include persons offered clerical positions who turned down such positions, both blacks and whites.

7.

The Court also rejects Dr. Graber's analysis as reflected in Plaintiff's Exhibit 24. The data used by Dr. Graber is faulty in that it does not accurately reflect the availability of clerical applicants with the Mississippi State Employment Service. Further, as Dr. Graber admit-

ted, the more appropriate benchmark would be based upon the percentage of blacks that actually applied for work at Defendant's facility.

8.

The Court accepts the testimony of Defendant's expert, Dr. Arnold Levine, as reflected in Defendant's Exhibit 13. This analysis correctly excludes transfers from other facilities and from the production department and correctly includes persons offered jobs as clericals. Plaintiff attempted to establish that two of the four blacks that Defendant's evidence shows were offered jobs, were not actually offered such jobs. The undisputed evidence reflected that the Defendant recorded job offers on the job applications. This was established in the case of the four blacks and the nine whites. The Court finds that Ms. Wilson and Ms. Reed were not credible witnesses and that they did not rebut the evidence that job offers were made to them.

9.

The Court also accepts the testimony of Dr. Levine as reflected in Defendant's Exhibit 15. This exhibit took into account the availability of blacks and whites for jobs when they became open, as well as relevant education and work experience. The Court is satisfied that the analysis fairly and accurately reflects this information and correctly concludes that there is no evidence of statistical dispari-

ty with respect to Defendant's hiring of blacks for clerical positions.

10.

Plaintiff offered no statistical evidence with respect to transfers to clerical positions. Dr. Levine's analysis, as reflected in Defendant s Exhibit 14, indicates that there is no statistical disparity between the expected number of blacks that transferred and the actual number. The Court accepts such analysis and finds no statistical basis to conclude that race was a factor in Defendant's transfer policy from production jobs to clerical jobs.

11.

The Court finds that the other evidence offered by Plaintiff in support of her claim of class discrimination, i.e., the testimony of the witnesses and various documentary evidence, likewise does not establish any discrimination on the part of Defendant against blacks as a class in filling clerical positions.

12.

The evidence did not establish that race played any part in Defendant's failure to place Plaintiff Rose Harrell in a clerical position. Similarly, the evidence did not establish that race played any part in Defendant's placement of blacks in clerical positions.

Jackson, Mississippi, this 8 day of September, 1980.

/S/ HAROLD COX
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

Rose HARRELL, on behalf of herself and all persons similarly situated, Plaintiff-Appellant,

v.

NORTHERN ELECTRIC COMPANY, Division of Sunbeam Corporation, Defendant-Appellee

No. 80-3781

United States Court of Appeals, Fifth Circuit

April 5, 1982.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ and RANDALL, Circuit Judges*.

POLITZ, Circuit Judge:

Rose Harrell invoked the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against Northern Electric Company, a Division of Sunbeam Corporation (NECO), contending that NECO practiced discrimination against blacks in the hiring of

---

* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death on March 4, 1982, this case is being decided by a quorum, 28 U.S.C. § 46(d).

clerical employees at its Hattiesburg, Mississippi facility. On Harrell's motion, the complaint was certified as a class action under Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure. The court bifurcated the trial, and, at the close of evidence on the liability issue granted NECO's Fed.R. Civ.P. 41(b) motion to dismiss both the individual and class actions. We reverse and render on liability and remand with instructions for trial on the relief phase.

NECO manufactures small electrical appliances at several plants in Mississippi. Hiring for its Hattiesburg facility began in July 1974; operations commenced a few months later. The pertinent work force numbers about 550, ten percent is classified as clerical.

Harrell applied for employment at NECO's Hattiesburg plant in August of 1974, noting "office" as her first job preference and "machine" as her second choice. She was hired in September as a cord assembler on the production line. A few weeks later she was interviewed for a clerical job but was not reassigned.

NECO furloughed Harrell in January of 1975 and recalled her the following month. She quit shortly thereafter to seek clerical employment elsewhere and filed a complaint against NECO with the Equal Employment Opportunity Commission. Harrell's termination rating qualified her for re-employment and she was rehired as a production line worker in October of 1977.

After receipt of a Right to Sue Letter from the EEOC, Harrell filed suit maintaining that NECO assigned blacks exclusively to production line work, refusing to hire blacks for the higher clerical positions for which they were qualified. Evidence adduced at trial was both specific, relating to treatment accorded Harrell and other applicants, and general, involving a consideration of statistical data.

Threshold Considerations

[1,2] The individual and class actions were dismissed on a finding that no prima facie case of discrimination had been established. This is a finding of ultimate fact. "The clearly erroneous standard of appellate review applies to subsidiary facts but does not apply to ultimate facts." *Thompson v. Leland Police Dept.*, 633 F.2d 1111, 1112 (5th Cir. 1980). We make an independent determination of the ultimate issue of discrimination. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975).

[3] NECO maintains that this case should be limited to a complaint of disparate treatment.[1] Recovery for disparate treatment requires proof of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Harrell argues the applicability of both the disparate treatment and disparate impact theories.[2] The restricted view advanced by NECO is not

[1] NECO supports this position by referring to paragraph 10 of the complaint which alleges that "...defendant has intentionally engaged in unlawful employment practices."

[2] The Supreme Court noted the difference between disparate treat-

consistent with the liberal treatment of pleadings mandated by the Federal Rules of Civil Procedure.[3] Our review encompasses both bases of recovery.

[4] We are mindful of the necessity that the allegations in the judicial complaint, and the proof offered, must be " 'reasonably related' to charges in the administrative filing," with "no material differences between them..." *Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir. 1980), *cert. denied*, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed.2d 198 (1981) (*citing Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir.

(Footnote 2 continued)
ment and disparate impact in *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1954 n.15, 52 L.Ed.2d 396 (1977):

> "Disparate treatment" ...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450...
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity...Proof of discriminatory motive, we have held, is not required under a disparate impact theory...*Either theory may, of course, be applied to a particular set of facts.* (Emphasis added.)

[3] Rule 15(b) of the Federal Rules of Civil Procedure provides that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Both parties introduced statistical evidence which is relevant to both disparate impact and disparate treatment considerations.

1971)). In its determination letter concluding the investigation of Harrell's complaint, the EEOC rejected Harrell's personal complaint of discrimination but stated "at least until the time of this investigation, [NECO] maintained a policy of failing or refusing to hire Black persons as a class in it office positions...because of their Race." We may examine all claims reasonably related to the EEOC investigation.

The Prima Facie Case—Disparate Impact

[5] The facts essential to the disparate impact assessment were stipulated. Between August 1974 and December 1978, NECO received 582 applications for clerical positions; 80 of the applicants were black. A total of 175 persons were hired for clerical jobs, 165 white and 10 black. Of the total hired, 137 (129 white, 8 black) were direct hires; 28 (26 white, 2 black) were in-plant transfers; and 10 (all white) were transferred from other NECO facilities.

Based on these figures, appellant's expert, Dr. Robert Graber, testified that the percentage of black applicants (13.7%) was significantly more than the percentage of black hires (5.7%). Dr. Graber found a disparity near three standard deviations.[4] He testified that a vari-

[4] In *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498 (1976), the Supreme Court addressed the statistical methodology of determining and the definition and significance of a standard deviation, which, adapted to the instant case would read:

ance in excess of 2.33 standard deviations is a "highly statistically significant disparity." In this calculation, Dr. Graber took into account both transfers and direct hires. NECO did not maintain records of transfer requests making it impossible to analyze the racial composition of transfer applicants. Viewing the data after deleting the transferees, we find 137 hired, 8 of whom were black. The disparity computed using this data exceeds 2.33 standard deviations.[5]

Appellants offered statistics provided by the Mississippi Employment Security Commission which reflect that 22% of all persons actively seeking clerical employment in the relevant geographic area were black. NECO challenged the reliability of this evidence by showing that the 22% represented the percentage of applications on file at the end of each month and did not take into

---

(Footnote 4 continued)

> The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binominal distribution as the square root of the product of the total number in the sample [either 175 or 137] times the probability of selecting a [black—13.7%] times the probability of selecting a [white—86.3%].

The Supreme Court noted that as a general rule, for a sample the size of that in *Castaneda*, if the difference between the expected value and the observed number is greater than two or three standard deviations, the challenged procedure becomes suspect.

[5] Standard deviations may be calculated from raw data by this mathematical formula:

$$\frac{np - x - .5}{\sqrt{npq}}$$

N equals number hired; p equals percentage of black applicants; x equals number of blacks hired; the .5 is a correction factor for a pool this size; and q equals percentage of white applicants.

consideration individuals who had applied and were placed during the month.

A fluctuation of more than two or three standard deviations undercuts the hypothesis that the hirings were made without respect to race. *Hazelwood School District v. United States*, 433 U.S. 299, 312 n.17, 97 S.Ct. 2736, 2743 n.17, 53 L.Ed.2d 768 (1977). Appellant's statistical basis is not perfect, however, the disparity between the percentages of blacks applying and those hired, considered in light of the total circumstances found in this record, is sufficient to raise a prima facie case of class discrimination. NECO is obliged to show that the disparity resulted from other than racial discrimination. *See Phillips v. Joint Legislative Com., Etc.*, 637 F.2d 1014 (5th Cir. 1981).

NECO's Refutation

NECO first challenges appellant's statistics for combining direct hires with transfers, resulting in a greater disparity than would have existed had transfers been excluded. We are not persuaded. The statistical evidence, considered within the framework of the totality of the evidence presented, is sufficient to make out a prima facie case whether or not the transfers are considered. Including the transfers simply presents a stronger statistical case.

NECO next challenges appellant's hiring figures for failing to take into account four blacks who were offered clerical jobs but declined employment. Good faith offers of

employment would be relevant and material. This contention requires close examination, for if all four of the purported "offerees" are included in the calculations, the statistical disparity only slightly exceeds two standard deviations. If the "offerees" are included and the transferees are excluded, the disparity falls below two standard deviations, belying a prima facie case of discrimination.

NECO maintains that Janice Wilson (Richard), Deborah McGee, Carolyn Reed, and Alan Thompkins refused to accept clerical jobs offered to them. Accepting, *per arguendo*, that these four black applicants were offered employment, the record is devoid of credible evidence that any of the four was offered clerical employment.

The employment applications of the four were offered as defense exhibits. In her application, Janice Wilson (Richard) gave "receptionist/secretary" as her first job preference and "clerical" as her second. An unsigned, undated, unidentified penciled notation in the margin reads "offered job—has accepted employment on other job." NECO's personnel director testified that he had no personal knowledge about the application but assumed that Wilson had been offered a clerical job because that was her stated preference. He conceded it was not unusual for NECO to offer an applicant a job other than that stated as a preference. Indeed, Harrell's experience attests to this practice. Richard testified that she never received a job offer from NECO. The record compels the conclusion that

Richard was not offered a clerical job.

Carolyn Reed's application is even more ambiguous. Reed listed "general office clerk" as her first choice. The bottom margin contains the unidentified notation "Does not want typing position," next to a notation in the same handwriting "could work overtime." NECO's personnel director testified that although he was not employed by NECO at the time, he had heard that Reed had been offered a clerical position and assumed that to be the case because of the above notation about typing. A personnel representative at NECO testified that Reed had been offered a clerical job, but admitted he had no personal knowledge of that happening. Reed denied that she was ever offered a job by NECO. On this record, it cannot be said that Reed was offered a clerical job.

The application of Alan Thompkins bears the margin notation "Called 8/23/77. Not interested now. Attending school." NECO's personnel director testified that he assumed Thompkins was offered a clerical job because that was his indicated preference. The personnel director had no personal knowledge about Thompkins. He did not know the author of the inscribed note.

Deborah McGee's application bears the glossation "never showed up for work." Again the personnel director had no personal knowledge about McGee, her application, or the notation, but assumed she had been offered a clerical job because that was her indicated preference.

Appellant offered the testimony of McGee and Thompkins, but the trial judge would not allow them to testify. Appellant made a proffer that if permitted to testify, each would deny that NECO extended a job offer.

The trial judge found that all four of these applicants had been offered a clerical appointment. This finding is clearly erroneous.

In addition to questioning the basis and methodology of appellant's disparate impact evidence, NECO sought to establish a business justification for its hiring practices. NECO contends that during the initial hiring period, until October 1974, it favored applicants with clerical experience. After this period, NECO suggests that only minimal skills were required. No specific skill level was established; no objective standards were adopted.

[6] In considering an application for transfer into a clerical job, NECO asserts that it took into account the employee's work record, experience, knowledge, skill, education and seniority. If fairly used, these are valid considerations. The employer has the prerogative to establish qualifications. That prerogative is not plenary, however, for "an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process...is challenged as discriminatory." *See Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300, 1315 (5th Cir. 1980) (*citing Rowe v. General Motors Corp.*, 457 F.2d 348, 358

(5th Cir. 1972)). *Rowe* condemned the subjective evaluations by white foremen of a black employee's "ability, merit, and capacity." 457 F.2d at 353. In the case before us, NECO used all white personnel to subjectively determine whether black outside applicants applying during the initial hiring period were qualified to do clerical work, and whether those subsequently applying possessed "minimally acceptable" skills. NECO's asserted criteria for evaluating transfers were equally subjective because NECO failed to prove they were applied in accordance with any standards or objective criteria. Under these circumstances, NECO's assertion that lack of qualifications justified its failure to hire blacks is insufficient refutation.

We conclude that NECO failed to refute appellant's prima facie showing of discrimination. Obviously appellant's case was based primarily on the statistical evidence. However, our conclusion involves an evaluation of the totality of the evidence presented. We note that NECO hired no black for a clerical position until after the EEOC complaint was filed. Further, NECO's explanation of the coincidental statistical variances strains our credulity.

We conclude that the class should have judgment against NECO and this cause must be remanded for trial on damages and for the fashioning of an appropriate remedy, all in accordance with our further instructions herein.

Individual Claims

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court refined the test for disparate treatment originally articulated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[6] *Burdine* did not alter the prima facie showing a plaintiff must demonstrate under *McDonnell Douglas*, which requires that a plaintiff show: (1) membership in a minority group; (2) an application for an open job for which he was qualified; (3) rejection; and (4) the employer continued to seek applicants. *Burdine* modified our interpretation of the burden placed on the defendant to rebut the prima facie case. The Supreme Court stated:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

101 S.Ct. at 1094. The Court rejected the notion that the employer must show that the person chosen was better qualified than the person rejected. If the defendant succeeds in rebutting the prima facie case, the plaintiff is then

[6] For recent expositions of *Burdine* in this circuit *see Sanchez v. Texas Commission on Alcoholism*, 660 F.2d 658 (5th Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981); *Jackson v. City of Killeen*, 654 F.2d 1181 (5th Cir. 1981); *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981).

given an opportunity to show that defendant's espoused reasons for the rejection were pretextual.

A. Rose Harrell

[7,8] Harrell demonstrated a prima facie case of employment discrimination. She was black; she applied for a clerical position in August 1974. Although hired for a production job, she was told she would be considered for a clerical assignment when one became available. In October or November of 1974 Harrell was interviewed for a clerical job she never got. Whether a clerical position was open on the exact date Harrell applied is not dispositive, for a "vacancy, within the meaning of the *McDonnell Douglas* test, need not exist on the precise day of application; any vacancies within a reasonable time must be considered as well." *Phillips v. Joint Legislative Com., Etc.*, 637 F.2d at 1030. When Harrell was interviewed, NECO was no longer solely hiring clerical employees with experience. During high school, Harrell took courses in typing and bookkeeping. After graduating she took a vocational course in typing, bookkeeping and filing. During the period between employments at NECO, Harrell took additional vocational training in typing and bookkeeping and worked as a secretary for a year and a half.

It is not possible on the state of this record to conclude, as did the trial judge, that Harrell was not qualified. The district court's finding that Harrell was not qualified is clearly erroneous. We find to the contrary.

McDonnell Douglas requires a rejection, after which applicants are still sought. The record on this point is not subject to question. After Harrell was passed over, NECO continued to hire, hiring whites.

NECO rebuts the prima facie case by contending that the reason Harrell was not transferred was a poor work record. Harrell adequately demonstrated that this was not the true reason for the employment decision. *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. at 1095. For example, Harrell's personnel file contains an unsigned "warning" slip bearing an infraction date after Harrell quit working for NECO. The file also contains an absentee warning slip dated six days after Harrell left NECO. We find the other assertions that Harrell failed to make production of some unspecified rate, and that she was cautioned about talking, equally unpersuasive. When Harrell left NECO's employ in March 1975, her record was marked to reflect that she was eligible for rehiring and she was later rehired. We find and hold that the reasons advanced by NECO, to justify their hiring decisions affecting Harrell's application for clerical employment, are pretextual. Harrell is entitled to judgment against NECO. On remand, the court will determine damages and fashion an appropriate remedy.

B. Betty Dagons

Betty Dagons had completed three years of college at Jackson State University, a year of vocational training, and had experience operating an adding machine prior to

applying for a job with NECO. Her manifested interest in clerical work received even less consideration than that given Harrell. She was hired and remained in a production job. NECO contends Dagon was not transferred because of a poor work history. The record does not support this position. Dagons is entitled to relief. On remand appropirate damages and remedy will be determined.

C. Patricia Ann Pittman

Patricia Ann Pittman sought clerical work at NECO in January 1977 and accepted production work when she was told that clerical work was unavailable. Pittman had 1½ years of college, a year of vocational training and two years experience as a bookkeeper and receptionist/PBX operator. Pittman was interviewed for at least two open clerical positions prior to July 1977 and was rejected. NECO contends that Pittman was rejected because of a poor work history. We find no merit in this contention. Pittman is entitled to relief. On remand appropriate damages and remedy will be determined.

D. Tommie Jean Smith Hinton

Tommie Jean Smith Hinton was referred to NECO in March 1975 by the Mississippi State Employment service. The referral related to a clerical position. There was a vacancy. Hinton was interviewed but not hired, ostensibly because she lacked prior experience. Hinton, a high school graduate, had a year of vocational training and secretarial

experience. Thereafter, this position was filled by a white applicant with a similar background. The trial court erred in excluding Hinton's testimony, presumably because NECO had no prior notice that Hinton would testify. Hinton is entitled to relief. On remand appropriate damages and remedy will be determined.

Conclusion

We reverse the judgment of the district court dismissing appellant's individual and class action. We render judgment in favor of appellant, individually, and on behalf of the class, against NECO, on the merits of the discrimination complaint. We remand to the district court for the Southern District of Mississippi for entry of an appropriate decree on liability, for trial on the damages portion,and for the fashioning of such remedy as may be found in order. We instruct the Chief Judge of the Southern District of Mississippi to assign this case on remand to someone other than the original trial judge.

REVERSED, RENDERED and REMANDED WITH INSTRUCTIONS.

APPENDIX "C"

Rose HARRELL, on behalf of herself and all persons similarly situated, Plaintiff-Appellant,

v.

NORTHERN ELECTRIC COMPANY, DIVISION OF SUNBEAM CORPORATION, Defendant-Appellee.

No. 80-3781

United States Court of Appeals Fifth Circuit.

June 21, 1982.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 1982, 5 Cir., 1982, 672 F.2d 444)

Before POLITZ and RANDALL, Circuit Judges.*

PER CURIAM:

We have re-examined our holding in light of the subsequent decision by the Supreme Court in *Pullman-*

---

* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death on March 4, 1982, this case is being decided by a quorum, 28 U.S.C. § 46(d).

Standard v. Swint, __ U.S. __, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Reviewing the record in accordance with the teachings of *Pullman-Standard v. Swint* relative to ultimate and subsidiary facts, and in light of the other authorities cited, we conclude that, except as modified herein, the result and mandate are correct. They are reaffirmed.

We reaffirm our conclusion that the trial judge erred in his assessment of the disparate impact issue. The error committed was essentially an error of law; the district court erred in its application of controlling legal principles to stipulated facts. The district court also erred in its evaluation of the stipulated facts as they related to the disparate impact issue. To the extent the assessment was factual it was clearly erroneous, Fed.R.Civ.P. 52(a). To the extent the assessment involved legal conclusions, it was legally incorrect.

We also reaffirm our conclusion relative to Rose Harrell's claims of discriminatory treatment. Again, the trial judge's factual assessment was clearly erroneous and his legal assessment was in error.

The Petition for Rehearing asserts that the rendering of judgment in favor of Betty Dagons, Patricia Ann Pittman and Tommie Jean Smith Hinton is not consistent with the bifurcated status of this litigation. On reconsideration, we agree. That portion of the opinion rendering judgment in favor of Dagons, Pittman and Hinton is recall-

ed and such claims as they may present shall be considered on remand when the district court determines the members of the class and determines the damages and other remedies to which the class, and the members thereof, are entitled.

In all other respects, the Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX "D"

42 U.S.C. §2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.